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IN THE SUPREME COURT OF THE STATE OF MONTANA

LLOYD S. MAIER,	)	Case No.: OP-10-0294
Petitioner,	)	
vs.	)	RESPONSE TO PETITION FOR
THIRD JUDICIAL DISTRICT	)	WRIT OF MANDAMUS
COURT,	)	
Respondent.	)	

Respondent Board of Pardons and Parole, through counsel Diana L. Koch, submits this response to Petitioner Lloyd S. Maier's Petition for Writ of Mandamus against the Third Judicial District Court. The Court has ordered the Board of Pardons and Parole to "file a response explaining their justification for refusing to provide Maier a copy of the [psychological] report."

FACTUAL BACKGROUND

A jury found Petitioner Lloyd S. Maier guilty of 2 counts of Attempted Deliberate Homicide and 2 counts of Use of a Weapon. Clemency Report, p. 1

(Attached and marked as Craig Thomas Affidavit Exhibit A). Maier fired an SKS assault weapon at a vehicle that contained two people. *Id.*, p. 2. He struck the vehicle at least eight times shooting both occupants in the leg. *Id.*

Maier was on parole for the offense of Criminal Endangerment committed with a dangerous weapon when he committed the Attempted Deliberate Homicides. *Id.*, p. 1. On June 26, 1996, the Cascade County District Court sentenced Maier to a total of 80 years in prison for the attempted deliberate homicides committed with a weapon. *Id.* The district court ordered Maier to serve 32 years before he is eligible for parole. *Id.*, p. 2.

Maier served the rest of the sentence for which he was on parole at the time he committed the present offenses and started serving the 80-year sentences on April 4, 1998. *Id.*, p. 1. He will be eligible for parole on April 4, 2030. *Id.*

In 2005, after he had served about 7 years of his 80-year sentence, he applied for executive clemency. *Affidavit of Craig Thomas*, ¶ 8. The Board requested psychologist Mark Mozer conduct an evaluation of Mr. Maier (Affidavit of Craig Thomas, ¶ 9); however, the Board did not base its decision on the results of the psychological evaluation. *See* Board of Pardons' Action report (Attached and marked as Affidavit Exhibit B). The Board denied his application based on:

> The nature and severity of the offenses, previous criminal history, poor history under supervision, horrendous misconduct record at Montana State Prison and the fact that [he is] not fully compliant with treatment.

Id. The Board concluded there was insufficient reason to hold a public hearing and denied his petition for clemency because it was "totally without merit." *Id.*

In September, 2009, Mr. Maier requested to see his parole file and on September 30, 2009, the Board allowed Maier to see his file but excepted Dr. Mozer's 2005 psychological evaluation. *Affidavit of Craig Thomas* ¶ 13. Craig Thomas, the Board's executive director, asserted Dr. Mozer's privacy interests and told Maier the report was confidential based on safety and security reasons. *Id.*, ¶ 15.

On October 5, 2009, Mr. Maier filed his second application for executive clemency. *Affidavit of Craig Thomas* ¶ 16. The Board notified Mr. Maier that he must undergo a psychological examination before the Board would consider his application for executive clemency. *Id.* Mr. Maier refused to meet with psychologist Mark Mozer; and consequently, on January 7, 2010, the Board dismissed his clemency application. *Id.* ¶¶ 16, 17. Mr. Maier, with his petition to the Third Judicial District Court asserted that he should have access to his 2005 psychological report; that it is not protected by safety and security reasons, and he demands a copy of the report. *See Powell County Petition.* This Court in its Order of June 29, 2010, ordered the Board to file a response.

ARGUMENT

When the Court must decide if a document in an inmate's parole file is confidential and is properly withheld from the inmate, the case on point is *Worden v. Board of Pardons*, 1998 MT 168, 962 P.2d 1157. *Worden* dealt with inmate parole files. In *Worden*, the Court held that,

> Inmates' parole files are documents of a public body to which the right to know applies. We determine that once a party requests access to an Inmate's file, it is incumbent upon the Board of Pardons to assert the privacy and penological interests involved. Only where the Board of Pardons or reviewing court determines that "the demand of individual privacy clearly exceeds the merits of public disclosure," Art. II, § 9, Mont. Const., or that a legitimate penological interest is served by nondisclosure, may access to an Inmate's parole files be denied.

Worden, at ¶ 37.

Further, the Court said that "privacy interests involved must be determined on a case-by-case." *Id.*, ¶ 31. Not "anyone who provides information to the Board necessarily has a privacy interest that outweighs the Inmates' right to know." *Id.* at ¶ 29.

The Court provided some guidance with specific examples: law enforcement personnel, the Court said, had no legitimate privacy interest in documents that were part of the district court file and public from the outset; Department of Corrections' personnel had no privacy interest in "records reflecting an Inmate's behavior while under its supervision;" a victim generally has a privacy interest only in the victim's address and phone number; and, members of the

general public who oppose an inmate's parole, like victims, can have their addresses and phone numbers redacted to protect their legitimate privacy interests. *Id.*, ¶ 29.

The Court, however, did not give the Board guidance concerning a psychologist who evaluates an inmate and writes an unfavorable report, especially a violent inmate who has been convicted of attempted deliberate homicide with the use of an SKS assault weapon.

To determine if a public body can refuse to release a document, the Court's analysis starts with Article II, Section 9 of the Montana Constitution which states that the public has a right to inspect all documents of a public body "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure . . . . It is 'incumbent upon the [Board of Pardons] to demonstrate why all or portions thereof should not be released because the rights of individual privacy outweigh the merits of public disclosure.'" *Worden*, at ¶ 31 quoting *Bozeman Daily Chronicle*, 260 Mont. 218, 859 P.2d at 441.

An inmate's right to know may be limited in two ways: one, when "the demands of individual privacy clearly exceed the merits of public disclosure," (*Worden*, at ¶ 33, quoting Art. II, § 9, Mont. Const.) and two, when the prison possesses a valid penological interest such as safety and security of the prison. *Worden*, at ¶ 33. If release of the document would compromise safety of an

individual, "the Department of Corrections could assert its legitimate penological interest in maintaining order and security within its institutions." *Id.*

The Court applies a two-part test to determine if a person has a valid privacy interest protected under the Montana Constitution. *State ex rel. Great Falls Tribune Co. v. Montana Eighth Judicial Dist. Court*, 238 Mont. 310, 318, 777 P.2d 345, 350 (1989). The first prong of the test is to determine if the person "had a subjective or actual expectation of privacy. . . ." *Id.* If the person had a subjective or actual expectation of privacy, is society "willing to recognize that expectation as reasonable." *Id.* The Court determined in *State ex rel Great Falls Tribune* that a probationer had an expectation of privacy in a revocation hearing when information would be presented that he was an informant for law enforcement. *Id.* That expectation, the Court said, was reasonable because "the risk to the person's individual safety from disclosing adverse information to the public would compel a reasonable person to recognize the expectation of privacy." *Id.*, 238 Mont. at 319, 777 P.2d at 350.

The Court determined that the Board of Pardons had to assert "the privacy and penological interests involved" if an inmate requests access to his file. If the Board concludes that the demand of individual privacy clearly exceeds the merits of public disclosure, or "that a legitimate penological interest is served by nondisclosure" it can deny the inmate access to the document. *Worden*¶ 37.

Legitimate penological interests rest in the "core functions of prison administration, maintaining safety and internal security." *Turner v. Safley*, 482 U.S. 78, 92 (1987).

In the instant case, Dr. Mozer has an actual expectation of privacy in his report. *Affidavit of Craig Thomas*. Dr. Mozer's expectation of privacy is based on the nature of his report and the risk to his individual safety if the inmate learns the contents of the report. *Id.* It is an actual expectation of privacy because the Board assured Dr. Mozer his evaluation of Lloyd Maier would remain confidential. *Id.* According to *State ex rel Great Falls Tribune* an expectation of privacy such as Dr. Mozer's expectation is reasonable. *Great Falls Tribune* at 319, 777 P.2d at 350.

There is no doubt, therefore, that Dr. Mozer has a right of individual privacy in keeping his report confidential. *Great Falls Tribune* stands for the proposition that an individual right of privacy in the person's safety clearly outweighs the right to know. The risk to Dr. Mozer's physical safety clearly outweighs Inmate Maier's right to know the contents of the psychological evaluation. *Id.*

Further, the prison has a legitimate penological interest in Dr. Mozer's safety while he is in the confines of the prison, and a legitimate penological interest in the security of the prison should an attack on Dr. Mozer take place. *Affidavit of Major Thomas Wood.* Such an attack would put both inmates and staff at risk and

compromise the internal security of the prison. *Id.* Safety of staff and inmates and internal security are the "core functions of prison administration. . . ." *Turner v. Safley*, 482 U.S.78, 92 (1987). Thus, the prison's penological interests in maintaining safety and internal security necessarily limit this inmate's right to know the contents of Dr. Mozer's psychological report.

The Board cannot just redact Dr. Mozer's name from the psychological report as the Court recommends in *Worden v. Board of Pardons*; Mr. Maier knows Dr. Mozer is the psychologist who interviewed him and prepared the report. Neither can the Board effectively redact any of the report and eradicate the threat to Dr. Mozer and the prison. Dr. Mozer's privacy interests and the prison's penological interests lie in the contents of the report, not in anything specific that can be redacted.

CONCLUSION

The Board of Pardons asserts on behalf of Dr. Mark Mozer a privacy interest in the psychological report Dr. Mozer prepared for a clemency hearing in Petitioner Lloyd Maier's case. The Board contends that there is a risk to Dr. Mozer's safety if Inmate Lloyd Maier learns the contents of Dr. Mozer's report. The Board also believes Dr. Mozer's privacy interest in his safety clearly outweighs Lloyd Maier's right to know. Finally, Montana State Prison possesses a legitimate penological interest in the safety of Dr. Mozer while he is inside the

prison and the security of the prison given the possible ramifications if there is violence towards Dr. Mozer. The Board attaches to this response a sealed copy of Dr. Mozer's report.

Dated this 28th day of July, 2010.

Diana L. Koch
Attorney for the Board of Pardons

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of July, 2010, I mailed a true and correct copy of the foregoing Response to Petition for Writ of Mandamus to the following, postage prepaid, U.S. Mail:

Lloyd S. Maier
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

Keon Craig

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 27 (d) (iv), I hereby certify that this Supplemental Response Brief is proportionately spaced, has a typeface of 14 points or more and contains no more than 5,000 words.

DATED this 28th day of July, 2010.

Diana L. Koch

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